RE PECD BHD & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[ORIGINATING SUMMONS NO: D1-24-63-2008]
22 JULY 2008

COMPANY LAW: *Arrangements and reconstructions - Restraining order - Extension of, application for - Non-compliance with requirements of paras. (c) and (d) of s. 176(10) Companies Act 1965 - Whether application ought to be dismissed*

This was an *ex parte* application by the applicants pursuant to s. 176(10) and (10A) of the Companies Act 1965 ('Act') for a 30-day extension to an original restraining order of 60 days. This application was opposed on the grounds that there had been failure on the applicants' part to comply with the requirements of paras. (c) and (d) of subs. (10A) of s. 176 of the Act in that a statement as to the affairs of the company was never lodged together with the application; and, secondly, no person was ever nominated by the creditors to acts as a director. The applicants conceded that although there was non-compliance with paras. (c) and (d) s. 176(10A) of the Act, they contended that paras. (c) and (d) did not apply to the present application as the period of the restraining order applied for by the applicants did not exceed 90 days. It was argued that the words "if and only if" and paras. (a) to (d) of s. 176(10A) of the Act only referred to the words "or such longer period as the court may for good reason allow"; they did not refer to the words "a period of not more than 90 days".

Held (dismissing the application):

(1) The courts have consistently held that compliance with paras. (a) to (d) of subs. (10A) of s. 176 of the Act is mandatory, and should there be non-compliance, then, the application ought to be dismissed. As for the argument advanced by the applicants, it was grammatically wrong to say that the words "if and only if" and the ensuing four paras. (a) to (d) only qualify the words "or such longer period as the court may for good reason allow" but not also the words "for a period of not more than 90 days". The four paragraphs apply to any restraining order pursuant to s. 176(10) and (10A) of the Act regardless of the length of the period of the restraining order applied for. If the legal draftsman had intended that the requirements of paras. (a) to (d) not apply to any application for a restraining order for a period not exceeding 90 days, then subs. (10A) would have been drafted differently. (paras 7 & 10)

Case(s) referred to:

Metroplex Bhd & Ors v. Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners) [2005] 3 CLJ 810 HC ***(refd)***

Pelangi Airways Sdn Bhd v. Mayban Trustees Bhd [2001] 6 CLJ 129 HC ***(refd)***

Re Sanda Industries Bhd & Ors [1999] 1 CLJ 459 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176(10), (10A)(c), (d)

For the applicants - Azhar Azizan Haron; M/s Cheang & Ariff

For FH Bertling (M) Sdn Bhd, a creditor of the applicants - D Baskaran (Denise Tan with him); M/s Shearn Delamore

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This *ex parte* summons in chambers (encl. 13) is an *ex parte* application by the applicants for a further period of restraining order of 30 days, as the original restraining order period of 60 days (granted by the Court of Appeal on 9 May 2008 on appeal by the applicants against my decision of 24 April 2008 dismissing the applicants' application for a restraining order) would expire on 9 July 2008.

[2] This application is made pursuant to s. 176(10) and (10A) of the Companies Act 1965.

[3] The hearing of this application was heard as an *ex parte* opposed application, the party opposing being a company known as F.H. Bertling (M) Sdn Bhd, a creditor of the applicants. Encik Azhar Azizan appeared for the applicants whilst Encik D. Baskaran (Cik Denise Tan with him) appeared for Bertling. Encik Azhar did not object when Encik Baskaran applied that the application be heard as an *ex parte* opposed application.

[4] Encik Baskaran opposed the application on the grounds that there had been failure on the part of the applicants to comply with the requirements of paras (c) and (d) of sub-s. (10A) of s. 176 of the Companies Act in that a statement as to the affairs of the company was never lodged together with the application; and, secondly, no person was ever nominated by the creditors to act as a director. Encik Baskaran refers to the following cases:

(a) *Re Sanda Industries Bhd & Ors* [1999] 1 CLJ 459;

(b) *Pelangi Airways Sdn Bhd v. Mayban Trustees Bhd* [2001] 6 CLJ 129;

(c) *Re Sanmatech Sdn Bhd*, unreported judgment of Balia Yusof J dated 24 July 2007 in Penang High Court Originating Summons No: 24-2092-2006; and

(d) *Metroplex Bhd & Ors v. Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners)* [2005] 3 CLJ 810.

[5] I have dismissed the application with costs and I shall now give my grounds.

[6] I have dismissed the application as the applicants have failed to comply with paras (c) and (d) of sub-s. (10A) of s. 176 of the Companies Act 1965. These two paragraphs stipulate:

> (10A) The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may for good reason allow if and only if:
>
> (c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and
>
> (d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director.

[7] As the cases referred to by Encik Baskaran above have shown, our courts have consistently held that compliance with paras. (a) to (d) of sub-s. (10A) of s. 176 is mandatory, and should there be non-compliance, then, the application ought to be dismissed.

[8] Encik Azhar conceded that there was non-compliance with paras. (c) and (d) of sub-s. (10A) in that a statement in the prescribed form as to the affairs of the company, as required by para. (c), was never lodged together with the application; and that no person was ever nominated by a majority of the creditors to act as a director as required by para. (d). Be that as it may, Encik Azhar, however, contended that paras. (c) and (d) do not apply to the present application as the period of the restraining order applied for by the applicants in the present case

does not exceed ninety days. Encik Azhar argued that the words 'if and only if' and paras. (a) to (d) of sub-s. (10A) are applicable only in respect of an application for a restraining order for a period longer than ninety days. In other words, the words 'if and only if' together with the four paragraphs only refer to the words 'or such longer period as the court may for good reason allow': they do not refer to the words 'a period of not more than ninety days'. For his proposition, Encik Azhar referred to *Pelangi Airways Sdn Bhd v. Mayban Trustees Bhd* [2001] 6 CLJ 129.

[9] In *Pelangi Airways* the applicant company applied for a restraining order for a period of one year. The application was granted by the court. Subsequent to the order, Mayban Trustees Bhd applied to set aside the one-year restraining order on the grounds, *inter alia*, that there was non-compliance by the applicant/Pelangi Air with paras. (c) and (d) of sub-s. (10A). Abdul Hamid Embong J (as he then was) allowed the application to be set aside. There is a passage in the judgment of the learned judge that reads:

> One of the mandatory requirements before a restraining order may be granted is for an applicant company to furnish a statement in the prescribed form as to its affairs. This is provided for under s. (10A)(c) which states:
>
> (10A) The Court may grant a restraining order under subsection (10) to a company for a period of not more than ninety days or such longer period as the Court may **for good reason allow if and only if**:
>
> (c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and (emphasis added)
>
> Firstly it can be immediately noticed from the phrase underscored above that the court will only allow a restraining order for a period beyond the principal 90 days only for a 'good reason'. The qualifying words 'if and only if' means that the applicant must, without fail' comply with the conditions set out in the subparagraphs to (10A), one of which is for the furnishing of its statement of affairs under sub-para. (c). This, in my view, is an absolute necessity in order that the court may discern a 'good reason' for extending the 90-day restraining period to say, as in this case, one year.

[10] With respect I am unable to agree with the argument advanced by Encik Azhar. To my mind it is grammatically wrong to say that the words 'if and only if' and the ensuing four paras. (a) to (d) only qualify the words 'or such longer period as the court may for good reason

allow' but not also the words 'for a period of not more than ninety days'. To my mind the four paragraphs apply to *any* application for a restraining order pursuant to sub-s. (10) and (10A) of s. 176 of the Companies Act regardless of the length of the period of the restraining order applied for. If the legal draftsman had intended that the requirements of paras. (a) to (d) do not apply to any application for a restraining order for a period not exceeding ninety days, then sub-s. (10A) would have been drafted differently.

[11] With respect I do not think that the judgment of Abdul Hamid Embong J does clearly say that the requirements of paras. (a) to (d) do not apply to an application for a restraining order where the period applied for does not exceed 90 days. In any case in *Pelangi Airways*, unlike the case before me, the question as to whether the four paras. (a) to (d) apply only to an application for a restraining order of a period not exceeding 90 days, or whether they apply to any application for a restraining order regardless of the duration of the order applied for, was not an issue.